No. 138, Original

IN THE

Supreme Court of the United States

STATE OF SOUTH CAROLINA,
Plaintiff,

v.

STATE OF NORTH CAROLINA,
Defendant.

On Exceptions to
First Interim Report of the Special Master

SUR-REPLY BRIEF OF THE STATE OF SOUTH CAROLINA IN SUPPORT OF EXCEPTIONS TO FIRST INTERIM REPORT OF THE SPECIAL MASTER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

GLOSSARY vii

INTRODUCTION 1

ARGUMENT 2

I. THE REPORT APPLIES AN INCORRECT LEGAL STANDARD 2

A. The Test For Intervention In Original Actions Is Stringent 2

1. The *New Jersey v. New York* Test Applies with Special Force in Equitable Apportionment Actions 2

2. A Party State's Citizen Bears a Heavy Burden of Demonstrating Inadequate Representation 7

3. Any Legitimate Interests of Putative Intervenors Can Be Accommodated Through Other Means 11

B. The Report's Novel Approach Is Inconsistent With This Court's Precedent 13

1. The Report's Approach Nullifies the Court's Adequate-Representation Requirement 14

2. The Report's "Instrumentality" Test Has No Basis in This Court's Precedent 16

II. EACH INTERVENOR FAILS THE COURT'S STRICT STANDARD 18

A. Charlotte Is Not Entitled To Intervene ... 18

1. Charlotte Cannot Demonstrate Any Interest Not Adequately Represented by North Carolina 18

2. Charlotte's Interest Is Neither Compelling Nor Apart from Other Water Users 19

B. CRWSP's Motion Fails For Substantially Similar Reasons As Charlotte's 20

C. Duke Is Not Entitled To Intervene 23

1. Duke's Interests Are Adequately Represented 23

2. Duke's Interests Are Neither Compelling Nor Unique 26

CONCLUSION 28

TABLE OF AUTHORITIES

Page

CASES

Arizona v. California, 460 U.S. 605 (1983) 2, 3, 8, 10, 11, 15, 16

Colorado v. New Mexico, 467 U.S. 310 (1984) 4

Environmental Def. Fund, Inc. v. Higginson, 631 F.2d 738 (D.C. Cir. 1979) 10

Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907) 4

Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938) 5

Hunter v. City of Pittsburgh, 207 U.S. 161 (1907) ... 12

Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261 (1997) 4

Kansas v. Colorado, 206 U.S. 46 (1907) 4, 5

Kentucky v. Indiana, 281 U.S. 163 (1930) 8

Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501 (1986) 13

Louve v. Ottaray Mills, 77 S.E. 135 (S.C. 1913) 22

Maryland v. Louisiana, 451 U.S. 725 (1981) 14

Nebraska v. Wyoming:

295 U.S. 40 (1935) 5

325 U.S. 589 (1945) 22, 24

515 U.S. 1 (1995) 2, 6, 7, 8, 13, 16

531 U.S. 10 (2001) 3

New Jersey v. New York:

283 U.S. 336 (1931) 22

345 U.S. 369 (1953) 1, 2, 5, 7, 8, 9, 10, 13, 14, 15, 18, 19, 20

Sierra Club v. Espy, 18 F.3d 1202 (5th Cir. 1994) 11

Smith v. Town of Morganton, 123 S.E. 88 (N.C. 1924) 22

Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs, 101 F.3d 503 (7th Cir. 1996) 11

Texas v. Louisiana, 426 U.S. 465 (1976) 14

United States v. Hooker Chems. & Plastics Corp., 749 F.2d 968 (2d Cir. 1984) 10, 12

United States v. Nevada, 412 U.S. 534 (1973) 2, 7, 8, 9, 10

Virginia v. Maryland, 540 U.S. 56 (2003 12

Wyoming v. Colorado:

259 U.S. 419 (1922) 24

286 U.S. 494 (1932) 4

298 U.S. 573 (1936) 22

CONSTITUTION, STATUTES, AND RULES

U.S. Const. amend. XI 5

16 U.S.C. § 825*l*(b) 25

N.C. Gen. Stat. Ann. § 143-215.11(a) 26

Fed. R. Civ. P.:

Rule 21 10

Rule 24(a)(2) 9, 10

Rule 24(b) 10

Sup. Ct. R. 17.2 10

JUDICIAL MATERIALS

First Interim Report, *Nebraska v. Wyoming*, No. 108, Orig. (June 14, 1989) 6

Memorandum in Support of the Motion of the City of Philadelphia for Leave To Intervene and To File an Answer to the Petition of the City of New York for Modification of the Decree, *New Jersey v. New York*, No. 5, Orig. (Mar. 7, 1953) 7

Motion of Basin Electric Power Cooperative for Leave To Intervene and Memorandum in Support of Motion and Answer, *Nebraska v. Wyoming*, No. 108, Orig. (Apr. 13, 1987) 6, 17

Seventeenth Memorandum of Special Master on Petition To Intervene of Basin Electric Power Cooperative, *Nebraska v. Wyoming*, No. 108, Orig. (Apr. 2, 1999) 1, 6, 7, 16, 17

Sixteenth Memorandum of Special Master on the United States' Motion To Dismiss and Motion for Summary Judgment, *Nebraska v. Wyoming*, No. 108, Orig. (Mar. 26, 1999) 6

Special Master's Memorandum of Decision No. 1 (Subject: *Amicus Curiae* Motions), *Virginia v. Maryland*, No. 129, Orig. (Dec. 11, 2000) 12

Third Interim Report on Motions To Amend the Pleadings, *Nebraska v. Wyoming*, No. 108, Orig. (Sept. 9, 1994) 6, 13

ADMINISTRATIVE MATERIALS

Federal Energy Regulatory Commission, Hydropower – Environmental Impact Statements (EISs), *at* http://www.ferc.gov/industries/hydropower/enviro/eis/2009/03-06-09.asp 27

Policy Statement on Hydropower Licensing Settlements, *Settlements in Hydropower Licensing Proceedings under Part I of the Federal Power Act*, 116 FERC ¶ 61270, 2006 WL 2709607 (Sept. 26, 2006) 25

GLOSSARY

CMO No. 8	Case Management Order No. 8, *South Carolina v. North Carolina*, No. 138, Orig. (Sept. 24, 2008)
Compl.	Complaint, *South Carolina v. North Carolina*, No. 138, Orig. (U.S. filed June 7, 2007)
CRA	Comprehensive Relicensing Agreement
CRWSP	Catawba River Water Supply Project
Draft EIS	Draft Environmental Impact Statement
Duke or Duke Energy	Duke Energy Carolinas, LLC
FERC	Federal Energy Regulatory Commission
IBT	interbasin transfer
LIP	Low Inflow Protocol
NC App.	Appendix to Brief of the State of North Carolina in Opposition, *South Carolina v. North Carolina*, No. 138, Orig. (U.S. filed Aug. 7, 2007)
NC Charlotte Resp.	Brief of the State of North Carolina in Response to the City of Charlotte's Motion for Leave To Intervene and File Answer, *South Carolina v. North Carolina*, No. 138, Orig. (U.S. filed Feb. 22, 2008)

No. 5 Phil. Mem.	Memorandum in Support of the Motion of the City of Philadelphia for Leave To Intervene and To File an Answer to the Petition of the City of New York for Modification of the Decree, *New Jersey v. New York*, No. 5, Orig. (Mar. 7, 1953)
No. 108 16th Mem.	Sixteenth Memorandum of Special Master on the United States' Motion To Dismiss and Motion for Summary Judgment, *Nebraska v. Wyoming*, No. 108, Orig. (Mar. 26, 1999)
No. 108 17th Mem.	Seventeenth Memorandum of Special Master on Petition To Intervene of Basin Electric Power Cooperative, *Nebraska v. Wyoming*, No. 108, Orig. (Apr. 2, 1999)
No. 108 Basin Mot.	Motion of Basin Electric Power Cooperative for Leave To Intervene and Memorandum in Support of Motion and Answer, *Nebraska v. Wyoming*, No. 108, Orig. (Apr. 13, 1987)
No. 108 First Report	First Interim Report, *Nebraska v. Wyoming*, No. 108, Orig. (June 14, 1989)
No. 108 Second Report	Second Interim Report on Motions for Summary Judgment and Renewed Motions for Intervention, *Nebraska v. Wyoming*, No. 108, Orig. (Apr. 9, 1992)

No. 108 Third Report	Third Interim Report on Motions To Amend the Pleadings, *Nebraska v. Wyoming*, No. 108, Orig. (Sept. 9, 1994)
No. 129 Mem. of Decision No. 1	Special Master's Memorandum of Decision No. 1 (Subject: *Amicus Curiae* Motions), *Virginia v. Maryland*, No. 129, Orig. (Dec. 11, 2000)
Report	First Interim Report of the Special Master, *South Carolina v. North Carolina*, No. 138, Orig. (Nov. 25, 2008)

INTRODUCTION

South Carolina seeks a decree equitably apportioning the Catawba River, so that South Carolina gets its fair share of the River's waters, irrespective of the particular uses that North Carolina authorizes from within its equitable share. Applying the test set forth in *New Jersey v. New York*, 345 U.S. 369 (1953) (per curiam), this Court has repeatedly prevented party States' citizens from intervening in such actions, which implicate uniquely sovereign interests. In such a dispute, each State has an obligation to represent the interests of all in-state water users as *parens patriae*.

Applying a different test, the Report recommends allowing three non-state entities to intervene. As proposed intervenors' briefs demonstrate, intervention would transform this equitable apportionment action between sovereign States into an intramural dispute over the interests of North Carolina water users. As precedent for such an extraordinary result, the putative intervenors can cite only the unreviewed decision of the Special Master in *Nebraska v. Wyoming*, No. 108, Orig. But they ignore that, by the time intervention was permitted more than a decade into that litigation, the relief Nebraska sought was no longer confined to each State's equitable share of an interstate river and the non-state entity was directly opposed to its home State, a situation "*sui generis* in the history of parties attempting to intervene in original jurisdiction cases."[1]

That situation is not presented here. Each proposed intervenor is adequately represented by one or both of the party States and can point to no interest

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[1] No. 108, 17th Mem. 12-13 (Duke Add. 13-14).

that is either compelling or unique from those of other citizens. Allowing any of these entities to intervene would open the floodgates to intervention in future cases, as they can offer no limiting principle that would exclude water users and dam and reservoir operators in future actions. South Carolina's exceptions therefore should be sustained and the motions to intervene denied.

ARGUMENT

I. THE REPORT APPLIES AN INCORRECT LEGAL STANDARD

A. The Test For Intervention In Original Actions Is Stringent

1. The New Jersey v. New York *Test Applies with Special Force in Equitable Apportionment Actions*

In *New Jersey v. New York*, this Court established a three-pronged test for intervention in original actions by any entity "whose state is already a party." 345 U.S. at 373. The entity must demonstrate (1) a "compelling interest in [its] own right," (2) "apart from [its] interest in a class with all other citizens and creatures of the state," (3) "which interest is not properly represented by the state." *Id.* The Court has consistently applied that test. *See Nebraska v. Wyoming*, 515 U.S. 1, 22 (1995); *United States v. Nevada*, 412 U.S. 534, 538 (1973) (per curiam); *cf. Arizona v. California*, 460 U.S. 605, 615 n.5 (1983).

The Court has never permitted a non-sovereign water user to intervene in an action to apportion equitably an interstate river. *See* SC Br. 21-23 & n.13;

US Br. 10-12.[2] The Court permitted Indian Tribes to intervene in *Arizona v. California*, but did so based on their sovereign status. *See* 460 U.S. at 615; SC Br. 23; US Br. 15.

Because South Carolina seeks an "equitabl[e] apportion[ment]" of the Catawba River and an injunction preventing North Carolina from authorizing transfers from or uses of the river "in excess of [its] equitable apportionment as determined by this Court's decree." Compl., Prayer for Relief ¶¶ 1-2, the interests putative intervenors assert must be assessed against the relief South Carolina seeks. Charlotte, CRWSP, and North Carolina portray the Complaint as a narrow attack on particular interbasin transfer authorizations. But the Special Master found that South Carolina's Complaint "encompasses a general request for an equitable apportionment" and is "broader" than specific "interbasin transfers." CMO No. 8, at 1, 4.

The United States likewise understands that South Carolina "complains generally that the totality of uses in North Carolina . . . are causing the alleged shortages in South Carolina's putative share of the Catawba," with Charlotte's and CRWSP's particular transfers being "manifestations of the broader problem about which [South Carolina] is complaining." US Br. 20, 21 n.4; *see also* Duke Br. 1 ("Th[is] action seeks an equitable apportionment of the Catawba River."). Therefore, South Carolina seeks no relief against any of the proposed intervenors specifically.

[2] The Court did not review the Special Master's decision in *Nebraska v. Wyoming* to allow Basin Electric to convert from *amicus curiae* to intervenor status, because the case settled shortly afterwards. *See Nebraska v. Wyoming*, 534 U.S. 40 (2001). That decision is inapposite here. *See infra* pp. 6-7.

Indeed, under this Court's cases, equitable apportionment is a federal-law remedy that divides an interstate river's waters between *States*, not sub-units or citizens of those States. Whether any specific North Carolina user must reduce its water transfers or other water consumption will depend on North Carolina's post-apportionment, state-law decisions about the intrastate allocation of its equitable share.

Sound reasons support the Court's consistent practice of denying intervention by non-sovereigns in equitable apportionment cases. As the United States explains, "special sovereign interests . . . are at stake in equitable-apportionment actions." US Br. 7. A river's "prosperity affects the general welfare of the state." *Kansas v. Colorado*, 206 U.S. 46, 99 (1907). Disputes about apportioning rivers rise "above a mere question of local private right and involve[] a matter of state interest," *id.*, in which each State acts "as a quasi sovereign and representative of the interests and rights of her people," *Wyoming v. Colorado*, 286 U.S. 494, 508-09 (1932); *see also Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907) (State "has the last word" in suits where it appears "in its capacity of quasi-sovereign"). Such disputes implicate "unique interests" of sovereign States. *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984); *see also Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 284, 287 (1997) (noting that "waters uniquely implicate sovereign interests" and that the State holds title to public waters "in its sovereign capacity for the purpose of ensuring that it is used for the public benefit").[3] Indeed, North Carolina authorizes users

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[3] Duke mistakenly suggests (at 17) that the same concerns with respect to intervention apply in all original actions. But the Court has denied intervention in equitable apportionment

to extract water from the Catawba River without any accountability for the effects on South Carolina users.

Federal common law resolves such conflicts based on an "equality of right" between the States as sovereigns. *Kansas v. Colorado*, 206 U.S. at 97. Therefore, an equitable apportionment "is binding upon the citizens of each State and all water claimants," *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 106 (1938), and the state-law rights of a "private appropriator" in either State "can rise no higher than those of" the party State. *Nebraska v. Wyoming*, 295 U.S. 40, 43 (1935). Federal law thus determines "the *overall* share of water to be allocated to each State, and state law then determines how that share is to be allocated among individual water users within that State." US Br. 11. A water user's burden to justify intervention to defend its particular state-law allocation of water, therefore, should be exceedingly high.[4]

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actions because of the State's *parens patriae* role and to prevent the Court from being "drawn into an intramural dispute" over matters of state law. *New Jersey v. New York*, 345 U.S. at 373. Those concerns are of particular importance in an equitable apportionment action, in light of the unique sovereign interests implicated through relief that may be obtained only as between States.

[4] Moreover, because equitable apportionment is a zero-sum game — water reserved for an individual user in North Carolina is denied to all users in South Carolina — allowing individual claimants to intervene as defendants raises Eleventh Amendment issues because their claims are, in effect, directly against the down-stream State. *See* SC Br. 18 n.11; *see also* Duke Br. 17 (acknowledging existence of Eleventh Amendment concerns in original cases). North Carolina concedes (at 10 n.1) that the intervention analysis is "completely different" where "intervenors . . . seek[] to assert claims" against a State. But North Carolina ignores the zero-sum nature of equitable apportionment actions

The eventual intervention of Basin Electric in *Nebraska v. Wyoming* is not to the contrary. Basin Electric, Nebraska, and the United States — but not Wyoming, Basin Electric's home State — were parties to a court-approved settlement in 1978, which required Basin Electric to make certain releases of water from its Grayrocks Dam and Reservoir. *See* No. 108 16th Mem. 7. Relying on that settlement — and Nebraska's express citation of the operation of Grayrocks as a source of its injury — Basin Electric moved to intervene at the outset of the case. *See* No. 108 Basin Mot. 3-7. The Special Master denied that motion, finding Basin Electric "comparable to ... Philadelphia in *New Jersey v. New York*." No. 108 First Report 12 & n.23. The Special Master permitted Basin Electric to participate as an *amicus curiae* — a status with which Basin Electric remained "content[]" until 1998. No. 108 17th Mem. 8-10 (Duke Add. 9-11).

As the Special Master explained, changes in the scope of the case, the relief sought by Nebraska, and the positions of the party States left Basin Electric (a citizen of Wyoming) directly adverse to Wyoming with respect to the 1978 settlement. Specifically, the Court and the Special Master permitted Nebraska to amend her complaint to add a new count with respect to the Laramie River — which does not extend into Nebraska — seeking to enjoin Wyoming from interfering with water releases under the 1978 settlement.[5] Therefore, any decree "protect[ing] Basin's

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in claiming that putative intervenors assert no affirmative claim for relief.

[5] *See* No. 108 Third Interim Report 30, 44-47 & n.121; *see also Nebraska v. Wyoming*, 515 U.S. at 11-13 (rejecting exceptions to recommendation to permit Nebraska to add this count).

and Nebraska's rights" under that settlement would "likely take the form of an injunction against Wyoming." *Id.* at 12 (Duke Add. 13). Thus, Basin Electric's "status ha[d] become *sui generis* in the history of parties attempting to intervene in original jurisdiction cases." *Id.* at 12-13 (Duke Add. 13-14). The Special Master found that, at that later point in the litigation and because of the change in relief at issue, Basin Electric now had a compelling interest (in light of Nebraska's efforts to enjoin Wyoming from interfering with the court-approved settlement) that Wyoming — which was not a party to the settlement — did not adequately represent. *Nebraska v. Wyoming*, therefore, does not support intervention here.

2. A Party State's Citizen Bears a Heavy Burden of Demonstrating Inadequate Representation

Although a potential intervenor must satisfy all three *New Jersey v. New York* factors, the Court has placed particular weight on the adequacy-of-representation prong. In *New Jersey v. New York*, Philadelphia claimed that it "cannot rely for an adequate presentation of its interest upon Pennsylvania," as it was "without any guide as to what [Pennsylvania's] policy on the Delaware now is or later may be." No. 5 Phil. Mem. 6. The Court denied Philadelphia's motion, finding that the claimed inadequacy was not a "concrete consideration in respect to which the Commonwealth's position does not represent Philadelphia's interests," which were "invariably served by the Commonwealth's position." 345 U.S. at 374.

Similarly, the Court explained in *Nebraska v. Wyoming* and *United States v. Nevada* that "individual users of water" would have "no right to intervene in an original action," because they are "unlikely" to

be able to show that their "interests are not adequately represented by their State."[6] In permitting Indian Tribes to intervene in *Arizona v. California*, the Court expressly distinguished *New Jersey v. New York*, noting that, unlike the sovereign Tribes — which are "independent . . . members of the modern body politic" — Philadelphia was required to show that its "interests were [not] adequately represented by [its] State." 460 U.S. at 615 & n.5 (internal quotation marks omitted).

The Court's insistence that an entity "whose state is already a party" show a "compelling interest" that "is not properly represented by the state" is based on the "*parens patriae* doctrine" and reflects "the principle that the state, when a party to a suit involving a matter of sovereign interest, *must* be deemed to represent all its citizens." *New Jersey v. New York*, 345 U.S. at 372-73 (internal quotation marks omitted; emphasis added). The "appearance . . . of a state" before this Court in an original action, "either as complainant or defendant, is conclusive," because the various citizens of the party States "have no separate individual right to contest in such a suit the position taken by the state itself." *Kentucky v. Indiana*, 281 U.S. 163, 173 (1930). Otherwise, "a state might be judicially impeached on matters of policy by its own subjects," and the Court, in the exercise of its original jurisdiction, would be "drawn into an intramural dispute" over matters of state law between a State and its citizens. *New Jersey v. New York*, 345 U.S. at 373.

The Court's rule is both a "necessary recognition of sovereign dignity" and "a working rule for good judicial administration" in original actions. *Id.* There-

[6] *United States v. Nevada*, 412 U.S. at 538; *Nebraska v. Wyoming*, 515 U.S. at 22.

fore, North Carolina's belated support for intervention[7] — and its professed lack of concern that it might be "judicially impeached by Charlotte's positions" — is irrelevant. NC Br. 23; *see* Charlotte Br. 24-26. North Carolina is not free to shirk its obligation in "dividing the waters of an interstate stream with another State" to represent all of the "users in its own State insofar as the share allocated to the other State is concerned." *United States v. Nevada*, 412 U.S. at 539. Charlotte, for example, concedes that its aim in intervening is for this Court to resolve an "intramural dispute" between upstream and downstream users *within* North Carolina. *New Jersey v. New York*, 345 U.S. at 373; *see* Charlotte Br. 16, 34.[8] That is something the Court has never done and should not do here, lest its "original jurisdiction" be "expanded to the dimensions of ordinary class actions." 345 U.S. at 373.

Drawing on cases under Rule 24(a)(2), Charlotte claims that it bears only the "minimal burden" of showing that its State "may be" an inadequate representative. Charlotte Br. 30 n.8 (internal quotation

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[7] North Carolina "deliberately . . . did not take positions with respect to these [motions]" before the Special Master. Mar. 28, 2008 Hearing Tr. 76:11-13. North Carolina did not "consent[]" to any of the motions, as it now claims. NC Br. 5.

[8] South Carolina is not defending "North Carolina's sovereign prerogatives," which Charlotte claims South Carolina "lacks standing" to do. Charlotte Br. 26-27. Instead, South Carolina relies on the unique relief that this Court's jurisprudence provides to apportion equitably the waters of an interstate river between concerned *States*, not between a State and the political subdivisions of another State. This Court's historical practice is to "exercise [its] original jurisdiction sparingly," regardless of whether a State or the United States is amenable to expansion of that jurisdiction. *United States v. Nevada*, 412 U.S. at 538.

marks omitted).[9] The Federal Rules of Civil Procedure, however, are only "guides" in original actions. Sup. Ct. R. 17.2. Moreover, this Court has expressly recognized that water users that would "have an opportunity to participate in their own behalf [in] litigation . . . in [a] District Court" under Rule 24 — despite their State being a party to the litigation — "would have no right to intervene in an original action in this Court." *United States v. Nevada*, 412 U.S. at 538; *see Environmental Def. Fund, Inc. v. Higginson*, 631 F.2d 738, 739-40 & n.5 (D.C. Cir. 1979) (per curiam) (holding that the "more stringent" *New Jersey v. New York* "test for intervention" "has full vitality for [original] actions," "but not for suits in federal district court").

Even under Rule 24(a)(2), a potential intervenor whose State is already a party "must overcome th[e] presumption of adequate representation," by showing "that its interest is in fact different from that of the state and that that interest will not be represented by the state." *Id.* at 740; *see United States v. Hooker Chems. & Plastics Corp.*, 749 F.2d 968, 985-87 (2d Cir. 1984) (Friendly, J.) (court should not lightly "permit[] intervenors to disrupt the government's exclusive control over the course of its litigation").

Charlotte instead cites administrative review cases in which courts have found inadequate representa-

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[9] Charlotte also suggests (at 34-35) that the Rule 24(b) permissive intervention standard applies, based on the Court's brief reference in *Arizona v. California* to the Indian Tribes "satisfy[ing]" that standard. 460 U.S. at 614-15. But the Court did not alter the *New Jersey v. New York* test, which does not permit intervention in original actions on so lax a standard. Instead, *Arizona v. California* relied on the Tribes' status as sovereigns, expressly distinguishing *New Jersey v. New York* on that ground. *See id.* at 615 & n.5.

tion after comparing the government's obligation to "represent the broad public interest" to the parochial interest of the proposed intervenor. *Sierra Club v. Espy*, 18 F.3d 1202, 1208 (5th Cir. 1994); *see* Charlotte Br. 30 n.8. But that is not the rule in original actions, where States act in their sovereign, rather than their regulatory, capacity. This Court found "no merit" in the contention that the federal government's obligation to "represent[] varied interests in litigation" meant that "the United States' representation" of the Indian Tribes' interests, prior to their intervention, "was inadequate." *Arizona v. California*, 460 U.S. at 627; *see also Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 101 F.3d 503, 508 (7th Cir. 1996) (Posner, C.J.) ("[m]ore is needed than" reliance "on the diversity of the Department[] [of Justice's] interests," otherwise "in no case ... could intervention be refused").[10]

3. Any Legitimate Interests of Putative Intervenors Can Be Accommodated Through Other Means

North Carolina contends (at 10) that, absent intervention, the Special Master "would [be] preclude[d] ... from hearing from" Charlotte, CRWSP, and Duke. North Carolina fails to note its own responsibility to speak on behalf of its political subdivisions Charlotte and Union County (part of CRWSP). It is a "settled doctrine[] of this [C]ourt" that "[m]unicipal

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[10] Charlotte gains no support (*see* Br. 30-33) from cases in which *States* were permitted to intervene. Those cases rest on the inarguable proposition that States are not required to let private parties or the federal government (acting through an agency as a regulator) represent their sovereign and *parens patriae* interests.

corporations" and other "political subdivisions of the state" are "created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them." *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907).

The Special Master in *Virginia v. Maryland* thus denied the unopposed motion of Loudoun County and its Sanitation District to participate even as *amici curiae*, reasoning that, as "political subdivisions of a party State, the Commonwealth of Virginia, and the Attorney General of Virginia represents their interests." No. 129 Mem. of Decision No. 1, at 3. The Special Master held further that, even if their interests "diverge from" the interests of others in Virginia, those interests raised only "conflicts internal to Virginia" that should be addressed "through coordination and cooperation" with the Virginia Attorney General. *Id.* at 3-4. Virginia "must speak with one voice in this litigation." *Id.* at 4.

In addition, as Judge Friendly explained, intervenors obtain "the right to have discovery and to make motions" and "the right to appeal." *Hooker Chems.*, 749 F.2d at 992. It plainly would distort the central constitutional purpose of original actions between two States to give such rights to citizens and political subdivisions of States. The Special Master here made no mention of the possibility of North Carolina's political subdivisions expressing their views through the State's Attorney General or of *amicus* participation at appropriate junctures in the litigation when putative intervenors' issues are most directly implicated. No intervenor explains why it should be permitted to use compulsory process to obtain information from a State or to file motions that could alter the scope and course of litigation between two sovereigns.

CRWSP and Duke assert only an interest in presenting evidence. *See* CRWSP Br. 28; Duke Br. 36. An *amicus*, however, "may selectively be permitted to introduce evidence . . . to develop certain issues." No. 108 Third Interim Report 20. Any such interest here can be accommodated without according the additional right of intervenors to compel production of information from the party States.[11] It would also be inappropriate for non-state entities to have the power to object to, interfere with, or except from a settlement to which the two party States agree. To the extent their views will benefit the Court, they can be expressed as *amici* without the panoply of party rights that an intervenor possesses.[12]

B. The Report's Novel Approach Is Inconsistent With This Court's Precedent

The Report did not apply the Court's *New Jersey v. New York* test, *see* SC Br. 25-32; US Br. 15-19, and none of the putative intervenors defends the new legal standard the Report "distilled." Report at 20. North Carolina and Charlotte ignore the Report's standard altogether; CRWSP relegates it to a footnote. *See* CRWSP Br. 36 n.3. Only Duke attempts a

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[11] South Carolina's issuance of discovery to CRWSP and Duke does not support intervention. They are only two among the many third parties that possess information potentially relevant to an equitable apportionment. (South Carolina has already served third-party subpoenas on five entities.)

[12] An intervenor, however, "does not have power to block [a settlement] merely by withholding its consent." *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 529 (1986); *see* US Br. 22; *see also Nebraska v. Wyoming*, 515 U.S. at 22 (equitable apportionment actions can be resolved "without the participation of individual claimants").

defense, but must distort the Report to do so. *See* Duke Br. 14-17.

1. The Report's Approach Nullifies the Court's Adequate-Representation Requirement

The Report placed no weight on the requirement that an "intervenor whose state is already a party" demonstrate concretely that its interest "is not properly represented by the state." *New Jersey v. New York*, 345 U.S. at 373. North Carolina and Charlotte expressly acknowledge as much. *See* NC Br. 22; Charlotte Br. 16. CRWSP and Duke, in contrast, pretend that the Report found that the State parties would not adequately represent their interests. *See* CRWSP Br. 24-25; Duke Br. 11. Tellingly, neither cites any portion of the Report making such a finding. In fact, there is none. *See* Report at 21-32.

When South Carolina pointed out this failure to require a showing of inadequate representation, the Special Master acknowledged that South Carolina's argument "draws upon the test for intervention articulated in *New Jersey v. New York*." *Id.* at 39. But the Report sidesteps that argument with the erroneous view that the Court intends to permit a non-state entity with "concrete interests" that are "directly at stake" to "speak for itself," without regard to whether that entity's interests are "aligned with those of the defendant state or states." *Id.* at 39-40 (internal quotation marks omitted).[13]

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[13] The Report errs in suggesting that, in *Texas v. Louisiana* and *Maryland v. Louisiana*, the Court permitted intervention where the party State adequately represented the intervenors' interests. In fact, Texas could not adequately defend Port Arthur, which asserted a property right in a discrete piece of land against both the United States and Texas. *See* SC Br. 32-33. In *Maryland v. Louisiana*, the pipelines' home States were

Duke, however, contends that the Report gave proper weight to the adequacy-of-representation factor, relying on the Report's assertion that the "Court does *not* require a 'conflict of interest or some other disabling factor that would prevent the party state from representing the proposed intervenor's interests.'" Duke Br. 15 (quoting Report at 23). But Duke cannot point to any finding in the Report that its interests — or those of Charlotte or CRWSP — are "not properly represented by" the party States. *New Jersey v. New York*, 345 U.S. at 373.

Instead, Duke claims that the Report's distillation of "compelling specific interests" *implicitly* identified those circumstances where the party State does "not . . . adequately represent[]" its citizens, despite the absence of any "directly conflicting interest" between the State and its citizen. Duke Br. 15-16. The Report, however, characterizes those circumstances as ones where the State parties "likely . . . would protect the non-state entity's interest" or where that entity was "clearly . . . aligned with . . . the defendant state." Report at 40.

In all events, the Report and Duke misread this Court's precedents. "[A] conflict of interest or some other disabling factor" (Report at 23) *is* required, particularly in an equitable apportionment case. In *Arizona v. California*, after permitting Indian Tribes to intervene based on their sovereign status, the Court addressed the Tribes' claim that they were entitled to revisit matters decided while they were

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not parties to the case, and the Special Master there found the pipelines and State plaintiffs to have different interests. *See id.* at 34-35. Duke and CRWSP repeat the Report's errors without addressing those points. *See* Duke Br. 16 n.3, 18 n.4, 19 & n.5; CRWSP Br. 31-36.

not parties to the case because "the United States' representation" of their interests had been "inadequate." 460 U.S. at 627. The Court rejected that contention because the Tribes had made no showing that the United States "was involved in an actual conflict of interest." *Id.* Similarly, in *Nebraska v. Wyoming*, the Special Master found that the party States adequately represented Basin Electric until the case evolved to the point where Basin Electric would likely have to seek "an injunction against [its home state] Wyoming" to protect its interests. No. 108 17th Mem. 12 (Duke Add. 13). As the Special Master there concluded, "Wyoming [could] hardly be put in the position of presenting evidence to support an injunction against itself." *Id.*

2. The Report's "Instrumentality" Test Has No Basis in This Court's Precedent

Relying exclusively on cases where plaintiff States named both other States and non-state entities as defendants, the Report concludes that non-state entities should be permitted to intervene "in water disputes" if they are "accused of being the agent of injury" or the "instrumentality authorized to carry out the wrongful conduct." Report at 14, 21. Those cases reflect no determination by this Court that the non-state entities, if not named as defendants, could properly have intervened. *See* SC Br. 28-31; US Br. 17-19. Instead, they reflect a brief period of uncertainty in this Court's cases, which ended in 1932, when it was unclear whether an equitable apportionment decree binds the citizens of party States. *See* SC Br. 28-29 & n.17.[11]

[11] Duke asserts (at 20) that the Report relied on those cases to "demonstrate that there is no constitutional barrier to third-

Moreover, the Report's "agent of injury" test eviscerates the *parens patriae* principle that a State must be deemed to represent all of its citizens; in virtually all cases one State will injure another State through its agents or instrumentalities, all of which (under the Report's approach) would be permitted to intervene. *See* SC Br. 31-32. Lacking any limiting principle, the Report's test subjects a State to the enormous additional costs, burdens, and delay of litigating against the putative "agents" of another State, when the defendant State can provide the complete relief the plaintiff State seeks.

The decisions of the *Nebraska v. Wyoming* Special Master on Basin Electric's intervention motions likewise undermine the "agent of injury" theory. Basin Electric initially sought to intervene on the ground that Nebraska's complaint identified Basin Electric's operation of the Grayrocks Dam and Reservoir as a source of its injury. *See* No. 108 Basin Mot. 3-7. But the Special Master *denied* that motion, finding Basin Electric to be no different from the City of Philadelphia. *See* SC Br. 22-23. Only after Nebraska later sought relief that caused Basin Electric to be directly adverse to its home State of Wyoming did the Special Master perceive a "*sui generis*" situation and grant intervention. No. 108 17th Mem. 12-13 (Duke Add. 13-14).

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party participation in [equitable apportionment] cases." South Carolina never claimed that the Constitution prohibits a State from naming a non-state entity as a defendant. In addition, the Report cites (at 14-15) those joinder cases to justify its "agent of injury" theory; they are the *only* cases cited for that theory.

II. EACH INTERVENOR FAILS THE COURT'S STRICT STANDARD

A. Charlotte Is Not Entitled To Intervene

1. Charlotte Cannot Demonstrate Any Interest Not Adequately Represented by North Carolina

Charlotte's sole asserted interest is in its IBT permit. *See, e.g.*, Charlotte Br. 1, 17. Although Charlotte claims that North Carolina will not fully represent Charlotte's interest, North Carolina has disputed Charlotte's claim from the outset and continues to "disagree[] with this assertion by Charlotte." NC Br. 22; *see* SC Br. 39. Like Philadelphia, Charlotte points to no "concrete consideration" as to which its position diverges from North Carolina's. *New Jersey v. New York*, 345 U.S. at 374.

Charlotte, however, claims that it can "make [a] showing of inadequacy of representation" by pointing to the fact that "North Carolina must represent the interests of all water users . . . . including municipal users upstream of Charlotte," while Charlotte's interest "is exclusively that of a downstream water user." Charlotte Br. 16, 33. Consequently, Charlotte maintains, North Carolina "may not adequately represent . . . Charlotte's narrower interest." *Id.* at 31.

Such an "intramural dispute over the distribution of water *within* the [State]," however, has no place in an interstate equitable apportionment action. *New Jersey v. New York*, 345 U.S. at 373 (emphasis added). Charlotte's requested preferential treatment vis-à-vis upstream North Carolina water users is insufficient to justify its intervention here, and also fails the *New Jersey* requirements that the intervenor's interests be both "compelling" and "apart from his interest in a class with all other citizens and creatures of the state." *Id.*; *see* US Br. 20 ("The

proposed intervenors may well have a stake in the ensuing 'intramural dispute,' but their interests in the apportionment are represented by their States.").[15]

2. Charlotte's Interest Is Neither Compelling Nor Apart from Other Water Users

Although South Carolina's Complaint mentions several interbasin transfers, the suit is directed at all North Carolina uses, including in-basin withdrawals. The IBTs dramatically illustrate that North Carolina authorizes extremely large uses of the Catawba River without sufficiently considering their effects in South Carolina. Charlotte's IBT is among dozens of withdrawals that may or may not be affected by North Carolina's *intra*state apportionment of its equitable share. *See* SC Br. 41-44; US Br. 21 n.4. As the United States notes, "[a]ll water users in North Carolina have interests that are potentially affected by the relief sought against their sovereign." US Br. 20-21. If Charlotte's existing water use were sufficient to satisfy the first two prongs of the *New Jersey v. New York* test, "wide-scale intervention by individual water users" would follow. *Id.* at 21.

Nevertheless, Charlotte advances its status as the largest municipal user of water in North Carolina as a basis for intervention, as well as its IBT representing the "lion's share" of IBTs in North Carolina. Charlotte Br. 18; *see also id.* at 3 (claiming responsibility for "53 percent of all municipal usage of the water resources of the Catawba River basin"). In

[15] Charlotte claims it will offer unique defenses. But adequate representation turns on whether, as *parens patriae*, North Carolina represents Charlotte's *interests*, not whether it will pursue the same litigation strategy.

New Jersey v. New York, however, the Court denied intervention to Philadelphia despite its representation of more than 50 percent of the water users in the affected watershed. *See* 345 U.S. at 373 n.*; US Br. 21 n.4. That clear holding resolves the same question here.

B. CRWSP's Motion Fails For Substantially Similar Reasons As Charlotte's

CRWSP's motion is "similar analytically to Charlotte's," Report at 25, as both have IBT authorizations from North Carolina. For the same reasons as Charlotte, CRWSP may not intervene. *See* SC Br. 45-46.

CRWSP, however, claims its interests will not be adequately represented because it is a "bi-state" entity, composed of a political subdivision in each party State. Br. 19. But any interests CRWSP's component parts have are represented by their home States. As the Special Master correctly found, "municipalities cannot combine to form a sovereign. Rather, municipalities are creatures of state law, and any rights they enjoy 'can rise no higher than those of [the party state.]' *Nebraska* v. *Wyoming*, 295 U.S. 40, 43 (1935)." Report at 27.[16]

1. North Carolina adequately represents CRWSP's interests with respect to withdrawals to benefit its North Carolina component, Union County, and which form the basis of its motion for intervention. *See* CRWSP Br. 8, 19-20. North Carolina seeks to preserve the maximum apportionment to which it is

[16] Contrary to CRWSP's suggestion (at 24), the Report gives no weight to its bi-state status. It recommends intervention by CRWSP "[f]or the same reasons as with Charlotte," Report at 27, which is a political subdivision of a single party State.

entitled. *See* NC Charlotte Resp. 1-2 (explaining that North Carolina "must represent the interests of *every* person that uses water from the North Carolina portion of the Catawba River basin" and "has every reason to defend the IBTs that it has authorized for the benefit of its citizens") (emphasis added). North Carolina affirms here that it "opposes" relief limiting "IBTs in North Carolina." NC Br. 21.

That Union County's water is withdrawn by CRWSP in South Carolina and piped north does not alter North Carolina's adequate representation of CRWSP's proffered interests: Union County's water use comes from North Carolina's equitable share. *See* CRWSP Br. 22-23; NC Br. 21. CRWSP's apparent fear that North Carolina might reallocate CRWSP's intrastate share cannot be raised here, but rather "will depend on how state-law water rights and uses are allocated." US Br. 20.

2. Nor can CRWSP manufacture a compelling case for intervention based on the interests of its *South Carolina* component. *See* CRWSP Br. 20-21. CRWSP has grounded its intervention solely on Union County's water uses. In any event, South Carolina, like North Carolina, seeks to maximize its equitable share, and thus adequately represents the South Carolina water users supplied by CRWSP. Any dispute among South Carolina users is likewise an intramural dispute under state law and not suitable for resolution in this case.

3. Finally, CRWSP (at 16-18) claims intervention is proper because the Court, in two equitable apportionment decrees, has set out particular priorities of use in each State. The Court did so, however, on the basis that those States followed the doctrine of prior appropriation prevalent in arid, western States,

"whereby priority of appropriation gives superiority of right." *Wyoming v. Colorado*, 298 U.S. 573, 576 (1936); *accord Nebraska v. Wyoming*, 325 U.S. 589, 618 (1945). North Carolina and South Carolina, in contrast, follow the "reasonable use" doctrine of riparian rights that does not rest on the principle of first in time, first in right.[17] The Court would be less likely here to specify particular prior appropriations in each State. *See New Jersey v. New York*, 283 U.S. 336, 346-47 (1931) (establishing permissible total state diversion, which "shall not constitute a prior appropriation").

In any event, the Court made clear that a decree identifying specific uses within a State nevertheless leaves those uses subject to state law. In *Wyoming v. Colorado*, the Court held that exceeding a decreed individual appropriation is no violation, "so long as the total diversions under all do not exceed the aggregate of the quantities accredited to them severally." 298 U.S. at 583; *see id.* at 584 (decree did not "withdraw water claims dealt with therein from the operation of local laws relating to their transfer").

Basing intervention on the possibility that the Court will weigh the costs and benefits of particular water uses would permit intervention by all water users seeking to have their use valued as high as possible by their home State. Such disputes over the relative values of individual uses in North Carolina raise state-law questions for North Carolina to resolve.

[17] *See, e.g., Lowe v. Ottaray Mills*, 77 S.E. 135, 136 (S.C. 1913); *Smith v. Town of Morganton*, 123 S.E. 88, 89 (N.C. 1924).

C. Duke Is Not Entitled To Intervene

1. Duke's Interests Are Adequately Represented

Duke claims two types of interests: (a) its operation of its hydropower system in accordance with the CRA and the terms of its FERC licenses; and (b) its rights under North Carolina law as an impounder of water. As to the first, the party States adequately represent any interest Duke has that is implicated in this proceeding. As to the second, North Carolina adequately represents Duke's interest.

a. South Carolina seeks an apportionment that should have the effect, in low-flow periods, of restricting the total amount of water North Carolina users may withdraw from the Catawba River, thus providing more water to flow into Duke's reservoirs and across the state boundary. North Carolina's IBTs in particular reduce that flow because that water does not return to the Catawba River Basin. Duke does not (and cannot) deny that, the more water available in the river system, the less likely it is that low-flow periods will occur. Duke will have more water upstream to release for power generation, and South Carolina will have more water to meet its legitimate needs. *See* SC Br. 50-51.

Vindicating South Carolina's interests will facilitate Duke's efforts to meet the minimum flow requirements set out in the CRA's Low Inflow Protocol ("LIP"), assuming FERC ultimately adopts it. A ruling for South Carolina that increases the amount of water available downstream will result in fewer and shorter invocations of the LIP's Stage 3, which has been invoked far more often in less than two

years than anticipated in Duke's modeling for the entire 50-year relicensing period. *See id.*[18]

Duke responds (at 27, 31) that lowered North Carolina consumption from an equitable apportionment is not the only possible outcome here. But that is simply a claim that South Carolina might not prevail, not a showing of inadequate representation.

Duke unpersuasively claims (at 27-28, 31) that each State's interest "to maximize" its apportionment might conceivably affect its ability to implement the LIP and unravel the CRA. North Carolina shares Duke's interest in keeping major water intakes sufficiently covered during times of low flow to protect the operations of municipal and industrial water users. Indeed, North Carolina has championed the CRA in defending against South Carolina's claims. *See* SC Br. 47-48. South Carolina likewise will seek to protect its public water supply and industry in amounts that might exceed CRA requirements.[19] An appor-

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[18] Stage 3 is the second-most serious LIP stage; Stage 4 is an emergency condition in which "Remaining Usable Storage" "can be fully depleted in a matter of weeks or months." NC App. 88a. Duke's modeling predicted Stage 3 would occur in only four months of the coming 50-year license term (Duke says six months, Br. 30 n.7, but it appears to be relying on rounding), yet over the last two years Stage 3 was in effect for 15 months, which as Duke concedes far outstrips the model's projections. *See* SC Br. 5.

[19] South Carolina is necessarily harmed whenever the LIP is triggered. This Court has consistently found that a downstream State meets its initial burden to show harm when the "inflow is not adequate to meet all of the normal demands for water." NC App. 66a; *see Wyoming v. Colorado*, 259 U.S. 419, 476 (1922) (decree based on dependable flows); *Nebraska v. Wyoming*, 325 U.S. at 608, 610 (same; finding that claims that "the water of a river [during low-flow periods] exceed the supply"

tionment that takes account of North Carolina's IBTs will make more water available to Duke and to South Carolina.

In addition, although the CRA requires various third parties to undertake conservation measures when the LIP is triggered, FERC apparently cannot enforce those obligations. *See* NC App. 72a-74a, 78a-80a, 83a-86a, 90a-91a.[20] Duke does not claim that either State will undermine those conservation measures. And because an equitable apportionment decree could functionally require North Carolina to take actions that enhance the efficacy of CRA measures, this action tends to strengthen, not unravel, the CRA.

Finally, the issues before FERC are within the exclusive jurisdiction of the court of appeals to review in the first instance. *See* 16 U.S.C. § 825*l*(b). Any federal interests are for the United States to represent, and the United States opposes Duke's intervention to protect its own private interests or federal public interests. As the United States explains, this Court and the Special Master can take account of the terms of any FERC license. Duke's participation as an *amicus* will be sufficient to provide Duke's views on any arguable tensions between a possible decree

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demonstrate that "a controversy exists appropriate for judicial determination").

[20] *See* Policy Statement on Hydropower Licensing Settlements, *Settlements in Hydropower Licensing Proceedings under Part I of the Federal Power Act*, 116 FERC ¶ 61270, 2006 WL 2709607, ¶ 6 (Sept. 26, 2006) ("[FERC] has jurisdiction only over its licensees, and therefore cannot enforce any condition . . . on a non-licensee.").

and its FERC license, should they arise. US Br. 20 n.3.[21]

b. Despite insisting that it "does not seek to intervene to protect or increase its share of water," Duke Br. 13, Duke repeatedly relies on its state-law rights "as an impounder of water [having] 'a right of withdrawal of excess volume of water attributable to the impoundment,'" *id.* at 26 (quoting N.C. Gen. Stat. Ann. § 143-215.44(a)); *see also* Duke Br. 2, 13, 19, 21, 34-36. North Carolina, however, represents those state-law rights and should be the one to establish their priority under state law.

2. Duke's Interests Are Neither Compelling Nor Unique

a. Duke's interests in the CRA and its FERC license derive from its status as a large water user on the Catawba River. Such interests cannot be compelling or unique, or every dam operator and impounder on every river would be entitled to intervene. And, because the availability of extra water would make Duke's compliance with the CRA easier, its interest as a water user cannot be "compelling."

South Carolina's claims focus on inequitable water consumption in North Carolina, which affects the amount of water left in the reservoir system that can flow into South Carolina. Those South Carolina interests do not even implicate the CRA. As Duke concedes, "the CRA does *not* purport to 'control any of the disputed water consumption in North Carolina.'" Duke Br. 29 (quoting SC Br. 51) (emphasis added).

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[21] Duke correctly states (at 2) that the party States (unlike certain state agencies) have not signed the CRA, but that has no impact on the States' ability to represent Duke's legitimate interests.

Indeed, the CRA expressly provides that it has *no* effect on state water rights, Duke's own relicensing application says the same thing, and FERC consistently makes its licenses subject to this Court's equitable apportionment judgment. *See* SC Br. 51-52. Accordingly, Duke's interest in the LIP that will be supported by South Carolina's position cannot be compelling.

Reinforcing those points is FERC staff's March 6, 2009 Draft Environmental Impact Statement for Hydropower License ("Draft EIS"), which recommends granting Duke's relicensing application with certain changes.[22] The Draft EIS confirms that "[p]ublic water supply, inter-basin transfers, wastewater, and industrial discharges are regulated by the states" and that "inter-basin transfers ... are not within the scope of this licensing process." Draft EIS at 122.[23]

The CRA, the Draft EIS, and FERC's practice of making its licensing orders subject to equitable apportionment decisions by this Court (*see* SC Br. 51) all make clear that the proper level of consumption in North Carolina for equitable apportionment purposes will not upset the CRA and is not a matter to be decided in the FERC proceeding, but rather for this Court's assessment of the proper interstate equitable apportionment.

b. Duke's state-law rights "as an impounder of water" in North Carolina are likewise neither com-

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[22] FERC, Hydropower – Environmental Impact Statements (EISs), *at* http://www.ferc.gov/industries/hydropower/enviro/eis/2009/03-06-09.asp.

[23] Duke's claim (at 2) that "the CRA reflects an equitable apportionment of the Catawba River" is therefore false.

pelling nor unique. Duke Br. 26. As Duke conceded before the Special Master, its water user interests are *not* compelling. *See* SC Br. 49 n.36; US Br. 20 n.3. Any rights Duke has under North Carolina water use law are for North Carolina to represent as *parens patriae*, and not for Duke to assert here.

CONCLUSION

The Exceptions of the State of South Carolina to the First Interim Report of the Special Master should be sustained, and the motions for leave to intervene of Charlotte, CRWSP, and Duke should be denied.

Respectfully submitted,

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